



OFFICE OF THE PRESIDENT

M E M O R A N D U M

TO: **Office of Compliance & Enforcement**
 Office of Program Performance

CC: LSC Board of Directors
 Leonard Koczur, Acting Inspector General
 Executive Directors of LSC Grant Recipient Programs
 Victor M. Fortuno, Vice President for Legal Affairs & General Counsel
 David L. Richardson, Acting Vice President for Administration
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FROM: **John Erlenborn**
 LSC President

DATE: April 25, 2002

SUBJ: Protocol Regarding Access to Information in Grant Recipients' Files

Attached you will find a document entitled "Access to Records." This document summarizes LSC management's internal practices with respect to accessing information contained in records maintained by LSC recipients. LSC management prides itself on thorough and effective monitoring of recipient activities and on its training of recipients with regard to compliance issues.

Of particular importance, however, are the methods for ensuring that LSC obtain necessary access to information in ways that ensure full compliance consistent with its statutory obligations. Congress has mandated that LSC effectively monitor and audit its grant recipients, and that LSC respect attorney-client privilege and ensure that LSC recipients carry out their work consistent with their professional responsibilities.

Please note that the statement of practices appended hereto as "Access to Records" does not and is not intended to waive or alter any of LSC's rights to documents and other information and does not apply to audits, investigations and other OIG activities.

The Protocol is intended to set forth LSC's policy with respect to accessing grant recipients' files and to facilitate better communication and understanding on this topic. With appropriate notice to the Board and LSC grant recipients, LSC's President may change or alter this Protocol as circumstances warrant.

ACCESS TO RECORDS

April 25, 2002

This document sets forth procedures to be used by LSC's Office of Compliance and Enforcement (OCE) and Office of Program Performance (OPP) when making requests to review documents that contain information about clients and their cases that may be protected from disclosure to LSC by the attorney-client privilege or the rules of professional responsibility.

STATUTORY FRAMEWORK

LSC has the statutory responsibility to ensure that recipients comply with the provisions of the LSC Act and regulations and any other laws, including appropriation provisions, which apply to LSC funds or recipients. See Section 1006(b)(1)(A). LSC is given explicit authority "to prescribe the keeping of records with respect to funds provided by grant or contract and shall have access to such records at all reasonable times for the purpose of insuring compliance with the grant or contract or the terms and conditions upon which financial assistance was provided." See Section 1008 (b).

However, the LSC Act recognizes that some records contain information that is protected by the attorney-client privilege and/or attorney's ethical responsibilities under rules of professional responsibility. Section 1009(d) of the LSC Act explicitly provides that "neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney-client privilege." In addition, section 1006(b)(3) includes both a prohibition that LSC "shall not, under any provision of this title, interfere with any attorney in carrying out his professional responsibilities" and also imposes an affirmative duty that LSC "shall ensure that activities under this title are carried out in a manner consistent with attorneys' professional responsibilities."

Section 509(h) of the 1996 LSC appropriation, which has been reenacted in each subsequent year, provides that, notwithstanding section 1006(b)(3), LSC auditors and monitors are given explicit access to "financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient ... except for reports or records subject to the attorney-client privilege." See *United States v. Legal Services of New York City*, 249 F.3d 1077 (D.C. Cir. 2001). In addition, section 504(a)(8) of the 1996 LSC appropriation authorizes LSC access to the client "statement of facts." Disclosure of information not required by these sections of the 1996 appropriation provisions is governed by sections 1006(b)(3) and 1009(d) of the LSC Act.

PURPOSE

The purpose of this document is to inform LSC recipients and other interested parties of the procedure for providing LSC access to records in a manner consistent with the attorney-client privilege and applicable rules of professional responsibility and the mechanism to resolve issues of how such access can be obtained.

GENERAL PRINCIPLES

LSC will act to carry out its statutory responsibilities to ensure compliance with the LSC Act, appropriation provisions and any other provisions of law and will do so consistent with the statutory provisions on both privileged and confidential information.

LSC recipients are obligated to provide information to LSC under the applicable LSC statutes, regulations, grant terms, grant assurances, and other rules and provisions regarding the receipt and use of LSC funds. For example, upon request, recipients must provide LSC access to all records specified in section 509(h) unless, as provided in section 509(h), the information sought is protected by the attorney-client privilege. In addition, upon request, recipients must also provide LSC access to original unredacted client "statement of facts," as required by 45 CFR §1636. Recipients and LSC will work together in good faith regarding issues of access to records that may contain information protected by rules of professional responsibility or the law on attorney-client privilege.

PROCEDURES

1. Applicability: This procedure applies to requests by the Office of Compliance and Enforcement (OCE) or the Office of Program Performance (OPP) for access to records of a recipient that may include information that may be protected by rules of professional responsibility or the law on attorney-client privilege. Such information will hereafter be referred to as privileged or confidential information. As applied to OPP, references to OCE and the Vice President for Administration shall be to OPP and the Vice President for Programs.

2. Notice to the Recipient: Whenever OCE proposes to review the records of a recipient either through an on-site visit or otherwise, OCE notifies the recipient orally and in writing about the purpose of the visit or review, what activities OCE will conduct, and what specific information and records are planned to be within the scope of the review. Each review is an ongoing process that may expand based on information reviewed. As such, OCE will notify the recipient orally and in writing when the scope of the review has changed or expanded and what information and records are further required.

3. Use of Intermediaries: In all written and oral communications with recipients, OCE will affirmatively propose that recipients use program staff as an intermediary to review case files (or other records containing privileged or confidential information) and to answer questions of OCE. During on-site visits, OCE will affirmatively encourage recipients to use such intermediaries and will not request direct access to or control over client case files or any other records containing privileged or confidential information.

4. Flexibility of Approaches: OCE shall consider and seek to accommodate reasonable approaches to access to records proposed by recipients to protect privileged or confidential information so long as such proposed approaches also ensure access by OCE to information it needs to carry out its responsibilities. Such reasonable approaches may include unique client identifiers when appropriate.

5. Unique State Ethics Rules: LSC acknowledges that there may be states where the rules of professional responsibility, ethics rulings, case law or other laws differ from the general framework under the Model Rules of Professional Responsibility and where the disclosures sought by OCE may implicate the recipient attorneys' professional responsibilities or other law. Recipients have the responsibility to bring such ethical rulings to the attention of OCE as set forth in section 7 below after they have been notified by OCE of an impending request for access to records containing privileged or confidential information

6. Questions of Attorney-Client Privilege: OCE shall not have access to information protected by the attorney-client privilege, including information covered by section 509(h). A recipient shall notify OCE under the procedures set forth in section 7 below, that the information sought is, in the recipient's view, protected by the attorney-client privilege.

7. Procedures for Addressing Privileged or Confidential Information: If a recipient believes that documents or information requested by OCE contain information that is protected by the attorney-client privilege, applicable rules of professional responsibility or other law, the recipient will send written notice to OCE as soon as possible setting forth (1) a full description of the nature of the privileged or confidential information, (2) a statement explaining the basis for determining that such information is privileged or confidential, and (3) any recommendations of reasonable approaches to accessing such information. Upon receipt of this notice, OCE will so notify the Vice President for Administration and seek to find a mutually satisfactory manner for obtaining access to the information consistent with the applicable rules of attorney-client privilege and professional responsibility and consistent with LSC's need for information to ensure compliance.

If OCE is not able to expediently resolve all outstanding issues of concern, it will, through the Vice President for Administration, promptly so advise LSC's President and the Vice Presidents for Programs, Legal Affairs and Government Relations of the access issues raised and the specific reasons why the proposed alternative methods of access are inadequate. The Vice President for Administration and Programs, with advice of the Office of Legal Affairs, then will review the concerns raised by the recipient. If the Vice Presidents for Administration and Programs do not agree with the position of the recipient, then LSC will so notify the recipient in writing and OCE will proceed with the review.

If Vice Presidents for Administration and Programs agree that the recipient has a reasonable claim that the information is privileged or confidential, then OCE will further seek to develop a mutually satisfactory manner for obtaining access to the information consistent with the applicable rules of attorney-client privilege and professional responsibility and consistent with LSC's need for information to ensure compliance.

8. Disputes Between LSC and Recipients: If OCE and the recipient cannot agree on an approach that will give OCE appropriate access to the records it needs and is consistent with the recipient's responsibilities to protect privileged or confidential information, OCE, through the Vice-President for Administration, may recommend to the Vice President for Programs that LSC should take appropriate action with respect to the recipient. The Vice President for Programs will review the recommendation and make further inquiry as appropriate. The Vice President for Programs may request that and the President may direct OCE to further work with the recipient on an acceptable resolution or appropriately modify the request.

If the Vice President for Programs determines that LSC should proceed to take action affecting the recipient, it shall notify the recipient in writing of the action that is proposed. If the action involves suspension or termination of funding, LSC will proceed in a manner consistent with Parts 1606 or 1623 of Title 45 of the Code of Federal Regulations. However, if the action involves a sanction or adverse action other than termination or suspension, then LSC may, and is encouraged to, allow a recipient an opportunity to further present its position. Such a process could follow the following procedure. The recipient would be given an opportunity to request a meeting with the Vice President for Programs to ask for reconsideration of the proposed action. If the recipient requests such a face-to-face meeting, the Vice President for Programs would convene such a meeting and make a recommendation to LSC's President as to how LSC should proceed. As soon thereafter as is practical, the Vice President for Programs would notify the recipient in writing of the recommendation to the President and the reasons therefore. The recipient may then request a meeting with the LSC President to ask for reconsideration of the Vice President's recommendation. The recipient would be given the opportunity to provide such additional written information as it believes will assist the President to fully and fairly consider its concerns and objections. Upon such request, the President could also convene a face-to-face meeting with the authorized representatives of the recipient. As soon thereafter as practical, the LSC President would advise the recipient of the final decision and reasons therefore. The decision of the LSC President would be in writing and shall be final and binding.

9. If LSC management determines that a recipient has taken an unreasonable position or refused to work in good faith with OCE on these issues, then LSC may take reasonable corrective action in addition to pursuing access to the information in question.

10. In describing these procedures, LSC does not in any way waive the statutory rights and obligations of LSC or LSC recipients regarding access to and review of LSC recipients' records and information. These procedures do not create new rights or obligations for LSC or LSC recipients and may be modified by the LSC President as warranted, with appropriate notice to the Board and field programs.